No. 80-1061

FEB 27 1981
ALEXANDER L. STEVAS,
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN WATERS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
*Solicitor General*

JOHN C. KEENEY
*Acting Assistant Attorney General*

JOHN J. ROSENBERG
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

# In the Supreme Court of the United States

OCTOBER TERM, 1980

---

No. 80-1061

JOHN WATERS, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

**QUESTION PRESENTED**

Whether the district court erred in admitting co-conspirator statements against the petitioner.

## TABLE OF CONTENTS


Page

Opinion below ..... 1

Jurisdiction ..... 1

Statement ..... 1

Argument ..... 5

Conclusion ..... 8


## TABLE OF AUTHORITIES

Cases:


*Guzman* v. *United States*, cert. denied, 444 U.S. 898 ..... 6

*James* v. *United States*, cert. denied, 442 U.S. 917 ..... 6

*Macklin* v. *United States*, cert. denied, 439 U.S. 852 ..... 6

*United States* v. *Andrews*, 585 F. 2d 961 ..... 5, 6

*United States* v. *Bell*, 573 F. 2d 1040 ..... 5

*United States* v. *Geaney*, 417 F. 2d 1116, cert. denied, 397 U.S. 1028 ..... 6

*United States* v. *James*, 590 F. 2d 575, cert. denied, 442 U.S. 917 ..... 5, 6

*United States* v. *Petrozziello*, 548 F. 2d 20 ..... 5, 6




PREVIOUS PAGE WAS BLANK

Page

Cases—Continued:

*United States* v. *Stanchich*, 550 F. 2d 1294 ..... 6

*United States* v. *Testa*, 548 F. 2d 847 ..... 6

Statutes:

21 U.S.C. 841(a)(1) ..... 1

21 U.S.C. 846 ..... 1

## OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on October 28, 1980. The petition was filed on December 26, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to distribute and to possess heroin with intent to distribute it, in violation of 21 U.S.C. 846, and of possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent eight-year terms of imprisonment, to be followed by a ten-year special parole term.

1. In January 1979, DEA agent George Williams began operating as an undercover agent in New York City. Agent Williams posed as a recently discharged soldier with access to a supply of quinine and mannite, cutting agents used to dilute heroin. During the early spring of 1979, Williams met defendant Archie Phillips, a low-level drug dealer. Phillips agreed to introduce Williams to other area drug dealers who might be interested in purchasing quinine and mannite, and who would be willing to sell heroin to Williams (Tr. 33-37, 313-314, 387-388). On May 1, 1979, Phillips introduced Williams to defendant Natalie Rice, another drug dealer. At this meeting Phillips asked Rice whether "the guy at the garage" was interested in purchasing any quinine or mannite. Rice responded that she did not know, but that she would try to find out (Tr. 37-43, 76, 303-304, 328-329).

The following day, Agent Williams and Phillips again met with Rice, at which time Rice indicated that her man

"Sugar" wished to purchase a large quantity of quinine. Rice's telephone records show two prior calls to petitioner on that morning. Phillips later told Williams that "Sugar" was the same person earlier referred to as the "guy at the garage," and still other evidence established that the "garage" was the PFP Garage owned by petitioner. Phillips also stated that it might be possible to purchase heroin directly from "Sugar," who sold the drug at a cheaper price than that offered by other dealers. Evidence introduced at trial showed that petitioner was known by the nickname "Sugar" (Tr. 44-59; Gov't Exhs. 1, 1A, 1B, 28(a), 35A-35F).

On the evening of May 3, 1979, Agent Williams and Phillips met again, and Phillips stated that they were going to see his "man at the garage" concerning the sale of the quinine. Phillips directed Williams to the vicinity of petitioner's PFP Garage. Phillips entered the garage and subsequently returned, explaining that he had spoken with "Sugar's" brother concerning the purchase of heroin from "Sugar." Williams and Phillips agreed to speak again after the latter had contacted "Sugar" personally (Tr. 58-62, 75, 719; Gov't Exhs. 2, 2A, 2B, 30).

Williams spoke with Phillips and Rice on several occasions during the next few weeks. On May 18, Rice informed Williams that the "man at the garage" was definitely interested in purchasing some quinine, and she asked Williams not to sell it elsewhere. Rice's telephone records indicate that she had placed a call to petitioner that morning (Tr. 64-68, 80; Gov't Exhs. 4, 4A, 5, 5A, 28(a)(1)).

On May 30, 1979, Williams met with Rice, who informed him that "Sugar" had obtained quinine from another source. Rice's toll records show a lengthy call to petitioner, made earlier that day. At that same meeting, Rice agreed to take 15 to 25 pounds of quinine on consignment from Williams. Williams at this time expressed interest in purchasing some heroin. Thereafter, on June 2, 1979, and on

September 12, 1979, Agent Williams purchased one-eighth of a kilogram of heroin from Phillips, Rice and certain of their associates (Tr. 77-84, 88-90, 134-161, 174-179, 261-262, 377-378, 398-406, 416-422, 461-465, 503-520, 548; Gov't Exhs. 7, 7A, 28(a), 28(a)(1)).

In early January 1980, Williams made arrangements with Rice and defendant George Brantley for the purchase of an additional one-eighth kilogram of heroin. The price was set at $70,000 plus 50 pounds of quinine (Tr. 182-186, 273, 423-434, 465-473; Gov't Exhs. 19, 19A, 24, 24A). The deal was initially set for January 10, but was postponed. Rice and Brantley explained to Williams that the delay was caused by problems with a middleman. Petitioner's telephone records indicate that shortly before Rice and Brantley called Williams to explain the delay, brief calls were placed from petitioner's phone to Rice's apartment (Tr. 186-200, 270-271, 278, 334-337, 434-438; Gov't Exhs. 19, 19B, 21, 21A, 22, 22A, 24A, 29(a)). The drug transaction was rescheduled for January 11. Telephone records show another call from petitioner to Rice that morning, just after Agent Williams confirmed the deal with Rice by phone.

Agent Williams, accompanied by DEA Agents Baker and Coleman, arrived at Rice's apartment shortly after noon on January 11. Williams and Coleman entered the apartment, while Baker remained in his car with the money and quinine (Tr. 199-203, 337-343, 345-346, 355-356, 438-441, 444, 480-491, 587-590, 626-629, 673-676, 682-685, 690; Gov't Exhs. 22, 29(a)). Once inside the apartment, Agents Williams and Coleman met Rice, Brantley, and petitioner's girlfriend, Debbie Smith. Brantley and Smith left shortly after the agents' arrival and were observed, along with petitioner, outside the apartment (Tr. 203-205, 279-280, 357-359, 480-491, 590-591, 651-656; Gov't Exh. 30). Brantley and Smith returned to the apartment a short time later.

After discussing the mechanics of the transaction with Brantley, Williams left the apartment in order to retrieve the quinine from Agent Baker, who was still waiting outside. Williams at this time observed petitioner entering the apartment building. Williams brought the quinine inside the building, and, at Brantley's direction, he put the quinine in a bathtub in the hall bathroom. Williams covered the quinine with a blanket, and Brantley placed a lock on the bathroom door. Williams, who had used the bathroom on previous visits to the Rice apartment, had never known it to be locked before (Tr. 205-208, 344, 365-369, 476, 659-661, 679).

At this point Brantley instructed Williams to bring the $70,000 into the apartment. Williams refused, and Brantley called off the deal. As Agents Williams and Coleman were leaving the building, they met Agent Baker, who had since obtained permission from his superiors to bring the money inside. The three agents then returned to Rice's apartment. Before entering, Williams noticed that the bathrom door was still locked. The agents entered the apartment and found Rice, Brantley and petitioner inside (Tr. 208-210, 445-447, 595-597, 679-680).

Brantley said something, and he and petitioner left the apartment; Williams observed them talking in the hallway until the apartment door was closed. Brantley re-entered the apartment alone a few minutes later. Agent Baker and Brantley counted the $70,000 and then agreed that Rice and Agent Coleman would take the money and pick up the heroin (Tr. 210-212, 370-373, 447-451, 597-600, 656, 659). Rice directed Coleman to the immediate vicinity of petitioner's garage. The deal was aborted, however, when Coleman refused to pay the $70,000 before seeing the heroin (Tr. 212-213, 451-453, 600-605, 680-681, 714-718).

While Rice and Coleman were gone, Brantley told Williams that the two women only had to go up the street to the garage to get the heroin. Brantley and Williams went into the hallway outside Rice's apartment to await the delivery of the heroin, and Williams noticed that the bathroom door was ajar. Noting Williams' observation, Brantley indicated that he would check on the quinine. Brantley held a brief, whispered conversation with someone in the bathroom, and then he pulled the bathroom door closed (Tr. 213-216).

Upon her return to the apartment, Agent Coleman gave an arrest signal, and waiting agents arrested Brantley and Rice. Agent Williams observed petitioner looking out of the bathroom door. Williams and Agent Baker opened the door and discovered petitioner standing within two feet of a brown paper bag containing 110 grams of high quality heroin. The quinine was still in the bathtub, but the blanket covering it had been disturbed. Petitioner was arrested.

## ARGUMENT

Petitioner contends (Pet. 7-12) that the nonhearsay evidence of his participation in the drug conspiracy was insufficient to permit the admission against him of co-conspirator statements describing the source of the heroin as "Sugar" and "the man in the garage." Arguing that there is a conflict among the courts of appeals on the proper standard regarding the admissibility of such statements,[1] petitioner

---

[1]Petitioner erroneously claims (Pet. 7, 10-11) that five courts of appeals have rejected the "fair preponderance standard" for a more stringent "prima facie" test. To the contrary, the First, Eighth, and Tenth Circuits have in fact adopted the "preponderance" test, while the Fifth Circuit has endorsed a "substantial evidence" standard. See *United States* v. *Petrozziello*, 548 F. 2d 20, 23 (1st Cir. 1977); *United States* v. *Bell*, 573 F. 2d 1040, 1043-1045 (8th Cir. 1978); *United States* v. *Andrews*, 585 F. 2d 961, 964-967 (10th Cir. 1978); *United States* v.

challenges the threshold "fair preponderance of the evidence" test endorsed by the Second Circuit in *United States* v. *Geaney*, 417 F. 2d 1116, 1120 (1969), cert. denied, 397 U.S. 1028 (1970), and applied by the district court in this case. But, as we have frequently stated in our briefs in opposition to similar petitions for a writ of certiorari, it is doubtful whether the slight verbal variations among the courts of appeals on this point will ever produce different results. See, *e.g.*, *Guzman* v. *United States*, cert. denied, 444 U.S. 898 (1979); *James* v. *United States*, cert. denied, 442 U.S. 917 (1979); *Macklin* v. *United States*, cert. denied, 439 U.S. 852 (1978). Furthermore, even assuming that the "prima facie" test advocated by petitioner is more stringent than the preponderance standard applied in this case (but see note 1, *supra*), review is unwarranted since the independent evidence of petitioner's participation in the conspiracy adduced at trial is overwhelming. Accordingly, the challenged co-conspirator declarations would have been admissible against petitioner under any standard, including the "prima facie" test.

Indeed, that evidence shows that petitioner regularly placed calls to or received calls from Rice on the dates and at the times when heroin or other drug-related transactions with Rice's source were being negotiated. During May 1979, when Rice informed Agent Williams that she would speak or had spoken to "the guy at the garage," telephone

---

*James*, 590 F. 2d 575 (5th Cir.), cert. denied, 442 U.S. 917 (1979). Moreover, in adopting these standards, the court of appeals have generally indicated that they were rejecting the "prima facie" standard because it is less stringent. See *United States* v. *Petrozziello*, *supra*, 548 F. 2d at 23; *United States* v. *Andrews*, *supra*, 585 F. 2d at 966; *United States* v. *James*, *supra*, 590 F. 2d at 580-581. Likewise, the Ninth Circuit, in reaffirming its acceptance of the "prima facie" rule, declined to adopt the more "stringent" preponderance test. *United States* v. *Testa*, 548 F. 2d 847, 853 (9th Cir. 1977). But cf. *United States* v. *Stanchich*, 550 F. 2d 1294, 1299 & n.4 (2d Cir. 1977).

calls were placed from Rice's telephone to petitioner's home telephone. On the evening of January 10, 1980, when the transaction for one-eighth of a kilogram of heroin was originally scheduled to take place, two telephone calls were placed from petitioner's telephone to Rice's apartment. These two calls were placed at a time when Rice and Brantley were in almost continuous contact with Agents Baker and Williams, and when Rice and Brantley themselves were waiting for information about the timing of the transactions. Similarly, on January 11, 1980, the date of the actual transaction, another telephone call was placed from petitioner's telephone to Rice's telephone, shortly after the time set for Agent Williams to confirm the deal. In the context of the negotiations then taking place between Phillips, Rice, Brantley, and Agents Baker and Williams, these telephone calls provided strong independent evidence of petitioner's involvement in the conspiracy.

In addition, the district court correctly concluded that petitioner's activities on January 11, 1980, at Rice's apartment supplied further substantial nonhearsay proof of his involvement in the conspiracy. Petitioner was first seen in the vicinity of Rice's apartment on that day when the agents arrived to consummate the heroin purchase. He was next seen inside Rice's apartment speaking with Rice and Brantley when the agents returned unexpectedly to resume negotiations after they had broken down. Petitioner, consistent with an intent to insulate his involvement in the deal, left the Rice apartment with Brantley following the agents' return.[2] A short time later, Brantley, who was orchestrating the mechanics of the drug deal and who had just informed Agent Williams that he was going to check on the quinine,

---

[2]Although petitioner asserts that he left the apartment after being asked to leave (Pet. 5), the testimony is clear that Brantley and petitioner spoke briefly and inaudibly, at which time Brantley simply excused himself and petitioner (Tr. 210, 371-372, 447-448, 597).

spoke with petitioner in the hallway bathroom where the quinine had been placed under padlock for safekeeping. Finally, of course, petitioner was arrested inside the previously locked bathroom with the heroin at his feet.

In light of all these circumstances—the telephone calls, the security measures, the whispered conversations, and the presence of petitioner and the heroin in the previously locked bathroom—petitioner's participation in the conspiracy was more than adequately established for the purpose of allowing the introduction of the various co-conspirator statements.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

JOHN C. KEENEY
*Acting Assistant Attorney General*

JOHN J. ROSENBERG
*Attorney*

FEBRUARY 1981